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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35517

**CF INDUSTRIES, INC. v. INDIANA & OHIO RAILWAY, POINT COMFORT
AND NORTHERN RAILWAY, AND THE MICHIGAN SHORE RAILROAD—
PETITION FOR DECLARATORY ORDER**

**REBUTTAL EVIDENCE AND ARGUMENT ON BEHALF OF
AMERICAN CHEMISTRY COUNCIL, ARKEMA, INC.
THE CHLORINE INSTITUTE, INC.,
THE FERTILIZER INSTITUTE AND PPG INDUSTRIES, INC.**

The American Chemistry Council ("ACC"); Arkema, Inc. ("Arkema"); the Chlorine Institute, Inc. ("CI"); The Fertilizer Institute ("TFI"); and PPG Industries, Inc. ("PPG"), hereinafter collectively ("Complainants"),¹ hereby file this rebuttal evidence and argument in accordance with the procedural schedule in this proceeding. After two rounds of evidence, the sum of RailAmerica's defense of its Special Train Service ("STS") requirement for toxic-inhalation hazards ("TIHs") is that STS is "safer" than regular train service. But that is not the standard by which the reasonableness of STS is measured. Consequently, RailAmerica has failed to rebut the overwhelming evidence in this proceeding that its STS requirement is an unreasonable practice.

Although they did not participate in the opening round of evidence and argument, Norfolk Southern Railway Company ("NS") and the Association of American Railroads ("AAR") have chosen to file reply comments. Neither NS nor AAR, however, takes any position on the reasonableness of RailAmerica's STS requirement. Rather, both argue

¹ Inasmuch as the identified parties are Complainants in Docket NOR 42129, they are referred to here as Complainants for ease of reference.

that railroads must have discretion to adopt operating measures to enhance the safety and security of TIH transportation. That, however, is not the issue in this proceeding. The issue is whether RailAmerica's STS requirement is a reasonable safety measure that produces an expected benefit commensurate to its cost, and when compared with other possible safety measures, represents an economical means of achieving the expected safety benefit. *Consolidated Rail Corp. v. I.C.C.*, 646 F.2d 642, 650-51 (DC Cir., 1981) ("*Conrail*").

I. RailAmerica Applies An Incorrect Standard of Reasonableness.

The debate over the burden of proof has confused the burden of proof with the standard of reasonableness. The burden of proving that a practice is unreasonable lies with the complainants, who must present evidence relevant to the standard of reasonableness. Upon making that showing, the burden of producing evidence shifts to the defendants to rebut complainants' evidence. If defendants fail to do so, the complainants successfully carry their burden of proof.

The confusion in this case has arisen because the applicable standard of reasonableness adopted in *Conrail* begins with a *presumption* that the existing comprehensive regulatory regime is satisfactory or adequate in the circumstances in which RailAmerica would require STS as an additional safety measure. *Id.* Therefore, upon presenting evidence of the existing comprehensive regulatory regime for the safe and secure transportation of TIH materials, the Complainants carried their initial burden in this proceeding, and the burden of producing evidence shifted to RailAmerica to show that the presumptively valid federal regulations are unsatisfactory or inadequate in the particular circumstances where RailAmerica requires STS (*i.e.*, TIH transportation). In

addition, *Conrail* defines the reasonableness of additional safety measures by whether “they produce an expected benefit commensurate to their cost,” and “when compared with other possible safety measures, they represent an economical means of achieving the expected safety benefit.” *Id.* at 648. The practical effect of the presumption established by *Conrail* is to shift much of the burden of producing evidence to RailAmerica, even though the burden of proof ultimately remains with Complainants.

RailAmerica attempts to avoid the *Conrail* holding by contending that *Conrail* is not applicable because it was decided prior to the Staggers Act. This is a red herring because the court in *Conrail* did not predicate its decision upon the statute. Rather, its decision was based upon the comprehensive federal regulatory safety regime that existed at the time. If anything, that regulatory regime has become even more comprehensive in the intervening decades. The continuing validity of *Conrail* post-Staggers is confirmed by a recent appellate decision in *North American Freight Car Association v. STB*, 529 F.3d 1166 (D.C. Cir. 2008) (“*NAFCA*”). Although the Court considered applying a presumption similar to *Conrail*, it did not do so because of the absence of a comprehensive federal regulatory regime over the subject matter in *NAFCA*. The Court did not overrule *Conrail* or find that it no longer applied because of the Staggers Act.

RailAmerica also argues against the *Conrail* standard of reasonableness by quoting the Board’s recent statement in *Arkansas Electric Cooperative Corp.—Pet. for Declaratory Order*, Finance Docket No. 35305, slip op. at 5 (served March 3, 2011) (“*Coal Dust*”), that:

Whether a particular practice is unreasonable depends upon the facts and circumstances of the case. The Board gauges the reasonableness of a practice by analyzing what it views as the most appropriate factors.

But this statement does not suggest that the Board would overrule *Conrail*; nor does it provide an alternate standard to *Conrail*. It simply recognizes that the standard may differ based upon the particular practice that has been challenged. In both *NAFCA* and *Coal Dust*, because the challenged practices did not intrude upon, or overlap with, a comprehensive regulatory regime administered by another federal agency, the *Conrail* standard did not apply. In this proceeding, by contrast, the challenged practice is almost a mirror image of the practice reviewed in *Conrail* (i.e., an STS requirement for a hazardous material subject to the comprehensive regulatory regimes administered by two other federal agencies). Thus, the attempts to distinguish *Conrail* in this proceeding must fail.

Because RailAmerica has denied the relevance of *Conrail*, it has not attempted to make any showing as to why STS is necessary for it to provide safe and secure transportation of TIH materials. Rather, RailAmerica contends that all it needs to show is that STS is “safer” than regular train service. Moreover, RailAmerica contends that it need not show how much “safer” STS is, or account for the cost of STS. In other words, RailAmerica seeks *carte blanche* to adopt any additional measures that, in its sole judgment, enhance safety to any degree, no matter how small or how costly. But, that is not the applicable standard. In view of this complete failure of proof, the Board must find that RailAmerica has not met its burden of justifying STS or the extraordinary cost of providing STS.

II. RailAmerica Disregards The Need for Uniform Safety and Security Regulations.

RailAmerica, the AAR and NS each contend that a railroad has the right to unilaterally impose “safety” requirements on shippers and receivers of TIH materials that

far exceed those requirements imposed on all parties by the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) of the United States Department of Transportation (“DOT”) under the Hazardous Materials Transportation Act, as amended by the Hazardous Materials Transportation Uniform Safety Act of 1990 (“HMTA”) (49 U.S.C. § 5101 *et seq.*) Their position is that, although the DOT may establish Hazardous Materials Regulations (“HMR”) under the HMTA only in accordance with the notice and public comment procedures of the Administrative Procedure Act (see, 49 U.S.C. § 5103 (b)(2)), railroads may require additional regulations and requirements without any public process or procedural safeguards at all.

The HMTA is a highly preemptive statute that prohibits additional regulations that PHMSA could have issued, but chose not to issue. See, *Chlorine Institute, Inc. v. California Highway Patrol*, 29 F.3d 495, 496-97 (9th Cir. 1994). A “major purpose of the HMTA was the development of a uniform, national scheme of regulation regarding the transportation of hazardous materials.” In *Colo. Pub. Util. Comm’n v. Harmon*, 951 F.2d 1571, 1580 (10th Cir. 1991) the Court held that: “[I]n enacting new preemption standards [in the 1990 amendments to the HMTA] Congress expressly contemplated that the Secretary would employ his powers to achieve safety by enhancing uniformity in the regulation of hazardous materials transportation.”

The obvious result of RailAmerica’s STS plan is to Balkanize requirements for the movement of TIH materials rather than provide for the uniform regulation of these materials as required under the HMTA and HMR. That is why PHMSA permits the imposition of “local” restrictions by a carrier only upon a showing that “local” conditions make transportation unusually hazardous. 49 C.F.R. § 174.20. STS is not in response to

any particular local condition that has been noted by RailAmerica, but a system-wide selective imposition of varying requirements without any showing of any need for them. Nor has RailAmerica complied with the requirements of Section 174.20 to demonstrate that local conditions justify the imposition of STS.

DOT also has adopted regulations regarding the uniform application of security measures governing rail transportation of TIH materials. See, 49 C.F.R. § 172.800 *et seq.* The same is true for the Department of Homeland Security (“DHS”), which also has jurisdiction over rail security matters. To the extent that RailAmerica seeks to justify its STS measures on security grounds,² those measures also improperly invade, without any justification, the province of the DOT and DHS and thus are unreasonable under the ICCTA.

RailAmerica claims that its authority to layer STS on top of the existing regulatory regime comes from a statement by FRA and PHMSA that “parties are encouraged to go beyond the minimum regulatory requirements in establishing and implementing plans, rules, and procedures for safe transportation operations.” *Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials*, 74 FR 1793 (Jan. 13, 2009). This statement has been interpreted overly broadly and out of context. The subsequent sentence reveals that FRA and PHMSA were only addressing “additional requirements that a party voluntarily imposes upon itself.” 74 FR 1793 (emphasis added). Clearly, STS is a requirement imposed upon shippers, and it is involuntary from their perspective. Moreover, nothing in this statement vitiates the required review of

² It is somewhat unclear as to whether RailAmerica is indeed relying upon security issues as a justification for certain STS measures such as hand-off requirements outside of High Threat Urban Areas. But to the extent that it is, requirements beyond those mandated by the federal regulatory agencies charged with issuing security regulations suffer from the same shortcomings as the alleged safety enhancements discussed herein. *CSX v. Williams*, 406 F.3d 667 (DC Cir. 2005)

such additional measures under the *Conrail* standard or PHMSA's own requirements for imposing "local restrictions" under 49 C.F.R. § 174.20. While railroads may be encouraged to adopt additional safety measures, such additional standards still must be reasonable in accordance with long-established standards.³

III. STS Is An Unreasonable Restraint Upon The Common Carrier Obligation.

While RailAmerica expends a lot of words attempting to avoid the standard of reasonableness in the *Conrail* decision, it does not clearly state what standard it would substitute. The closest indication of a standard is presented at page 14 of RailAmerica's Reply, where it avers that "the practices provided for in the Tariffs are reasonable because they do not interfere with the Respondent Railroads common carrier obligation, are not a burden on the shippers, and increase safety on the Respondent Railroads." Even this standard, however, RailAmerica cannot satisfy.

First and foremost, the STS requirement is an unreasonable restraint upon RailAmerica's common carrier obligation. RailAmerica mistakenly contends that, so long as it provides a rate and transportation upon reasonable request, it can provide that transportation in any form that it sees fit. RailAmerica, however, has overlooked the reasonable request aspect of the common carrier obligation. No TIH shipper has requested special train service. Rather, RailAmerica has imposed STS upon TIH shippers. This proceeding is about the reasonableness of RailAmerica's refusal to provide common carrier transportation of TIH materials by any means other than STS. Stated another way, is the request of TIH shippers for regular train service unreasonable?

³ NS, at page 7, makes the highly cynical and absurd assertion that "TIH shippers seek every opportunity to transfer tank cars containing [TIH commodities] into the railroads' custody as quickly as possible" because they "are well aware of the toxicological risks associated with their products." Because TIH shippers manufacture TIH and other hazardous commodities on a daily business, the ability to hand-off a few loaded rail cars to a railroad more quickly has no measurable impact on their risk profile.

For all of the reasons previously addressed by Complainants in their Opening Evidence, Reply Evidence, and this Rebuttal Evidence, requests to transport TIH materials in regular train service are reasonable and RailAmerica's insistence upon STS is an unreasonable restraint upon its common carrier obligation.

As for the burden upon shippers, the question is too narrow. It really should be more broadly stated as whether STS is a burden upon commerce. Even though the actions of a single Class III railroad might not be a huge burden in and of itself, if the Board authorizes one railroad to implement STS as an additional safety measure beyond existing regulations, it must consider the implications of dozens or even hundreds of other short line railroads adopting their own variations. As discussed in the preceding section, the resulting Balkanization would be contrary to the uniform comprehensive regulatory regime created by the HMTA.

Finally, it is not at all evident that STS reduces the risk of a TIH release in contrast with regular train service. Given the robust construction of TIH tank cars, placing TIH cars in special trains that travel at reduced speeds is not likely to reduce the risk of a TIH release at all.⁴ It is well-established that the most effective way to avoid a TIH release is to adhere to the existing comprehensive safety regulations.

⁴ In its Reply Evidence, RailAmerica submitted expert testimony regarding the puncture resistance of TIH tank cars from Gary Wolf. While Mr. Wolf observes that F-couplers are able to puncture tank cars at 25 mph, but not 10 mph, he fails to draw a critical distinction between train speed and the secondary car-to-car speed of impact. In "Hazardous Materials: Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials," 73 FR 17818, 17821 (April 1, 2008), DOT noted that, "Because the secondary car-to-car impact speed in a derailment or collision scenario is approximately one-half of the initial train speed, designing and constructing tank cars to withstand shell impacts of at least 25 mph and limiting the speed of those tank cars to 50 mph will ensure that in most instances, the car will not be breached if it is involved in a derailment or other type of accident." Thus, even the testimony of RailAmerica's own expert suggests that there is little, if any, risk reduction from operating special trains at lower speeds.

IV. The Rate Reasonableness Red Herring.

RailAmerica alleges that this proceeding is really about the level of its rates for moving TIH materials and not about the reasonableness of the STS. In Ex Parte No. 661, *Rail Fuel Surcharges* served January 26, 2007, the Board held that computing rail fuel surcharges as a percentage of base rate was an unreasonable practice and directed the railroads to change that practice. In *Rail Fuel Surcharges*, the railroads argued, as RailAmerica argues here, that the only way to attack the fuel surcharge program was through a rate reasonableness complaint. The Board had little difficulty in holding that misleading their customers with a fuel surcharge program that could not hope to merely recover increased fuel costs was indeed an unreasonable practice and should be discontinued.

In this case, as in *Conrail. supra*, and *Rail Fuel Surcharges*, the issue in question is not the level of the resulting rail rates. Plainly those resulting rail rates will vary from movement to movement, from shipper to shipper, and from RailAmerica subsidiary to RailAmerica subsidiary. What is in question is the reasonableness of unnecessary safety and/or security measures that have the effect of increasing “shipping costs many times over.” *Conrail* at 651. Accordingly, the result should be the same. The STS and its resulting increases in shipping costs constitute an unreasonable practice and the Board should order it stopped.

CONCLUSION

In view of the foregoing, the Board should find that the STS program of RailAmerica and its subsidiary carriers is an unreasonable practice that should cease immediately.

Respectfully submitted,

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March 13, 2012

Certificate of Service

I hereby certify that on this 13th day of March 2012, a copy of the foregoing Rebuttal Evidence and Argument on behalf of American Chemistry Council, Arkema, Inc, the Chlorine Institute, Inc., The Fertilizer Institute and PPG Industries, Inc. was served by electronic delivery on all parties of record in these proceedings.

/s/ Jeffrey O. Moreno